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In The

Supreme Court of the United States

October Term, 1980

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Idaho Supreme Court on the grounds that the questions presented are so unsubstantial as not to need further argument or, alternatively, that the decision of the Idaho Supreme Court is not a final judgment.

I.

Idaho's inclusion of certain dividends, interest and capital gains in apportionable income complies with the "unitary business" test laid down by this court in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U. S. 425, 100 S. Ct. 1223 (1980).

ASARCO's jurisdictional statement begins with a declaration of the questions presented which presumes a determination different from that actually made by the Idaho Supreme Court. In its statement of the first question presented, ASARCO alleges that the Idaho Supreme Court has erroneously included in apportionable business income "dividends paid to Appellant by functionally independent subsidiaries." [J.S. p. i] This characterization seriously misconstrues the Idaho Supreme Court's ruling. That Court determined that ASARCO had failed to prove that the dividends, interest and capital gains in question were earned from activities separate and distinct from its mining, smelting, refining and selling activities. [App. pp. 22a, 24a and 25a] It is important to note that where the Idaho Court found that ASARCO had established that income received from other dividend-paying subsidiaries was truly "separate and unrelated to ASARCO's general mining and smelting business" the dividends were classified as nonbusiness income, none of which could be attributable to Idaho by apportionment. [App. p. 23a]

But in regard to income about which ASARCO seeks review, the Idaho Court said:

> The clear inference from these facts is that ASARCO's interest in these companies was not merely that of

> a passive investor but that this dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business. [App. p. 22a]

An accurate understanding of the Idaho Court's decision in this regard is important. The Idaho Court concluded that the dividends, interest and capital gains in question were apportionable precisely because they were earned as an integral and necessary part of its mining and smelting business. Clearly, the Idaho Court did not—as ASARCO alleges—require apportionment of dividends paid by functionally independent or unrelated subsidiaries.

This Court should not be mislead by ASARCO's selective recitation of facts from the record. The factual record upon which the Idaho Court based its conclusion is clear. The Court's recital of the facts [App. pp. 5a through 12a] and its holding [App. pp. 19a through 26a] amply reflect the factual basis for concluding the income challenged by ASARCO is in reality income integrally related to its business activities in Idaho. Additionally, the Idaho Supreme Court is not alone in this conclusion. The Montana Supreme Court reached the same conclusion in regard to the same taxpayer for the same taxable periods. See *Montana Department of Revenue v. American Smelting and Refining Co.*, 567 P. 2d 901 (Mont., 1977), appeal dismissed, 434 U. S. 1042 (1978).

It is apparent that ASARCO's real disagreement with the Idaho Court's ruling is the Idaho Court's conclusion that it had failed to prove by clear and convincing evidence that the dividends, interest and capital gains in question

were what ASARCO alleges them to be, that is, non-unitary income.

Idaho's requirement that a taxpayer prove by clear and convincing evidence that its dividends, interest and gains are not part of its unitary business [*Idaho Code* § 63-3027(a)(1), at App. p. 67a] is appropriate. This Court has held that a taxpayer who attacks an apportionment formula carries a distinct burden of showing by "clear and cogent evidence" that it results in extraterritorial values being taxed. See *Butler Brothers v. McColgan*, 315 U. S. 501 (1942).

Additionally, ASARCO would seek to have this Court construe the "unitary business" test established in *Mobil Oil Co. v. Commissioner of Taxes of Vermont*, 445 U. S. 425, 100 S. Ct. 1223 (1980) so narrowly as to virtually negate the effect of that ruling. However, this Court has already explained the unitary business test in *Exxon Corp. v. Wisconsin Depart. of Revenue*, 447 U. S. 207, 100 S. Ct. 2109 (1980). *Exxon* answers the question ASARCO proposes this Court must review and answers it contrarily to ASARCO's position. ASARCO relies on the following language from *Mobil:*

> So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.

But the key language in *Mobil* is the statement:

> As these cases indicate, the linchpin of apportionability in the field of state income taxation is the uni-

> tary business principle. *In accordance with this principle, what appellant must show,* in order to establish that its dividend income is not subject to an apportioned tax in Vermont, *is that the income was earned in the course of activities unrelated to the sale of petroleum products in that state.* [Footnote omitted; Emphasis added; 100 S. Ct. 1223 at 1232]

In *Exxon,* supra, this Court explained this language as follows:

> The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary business principle." Mobil Oil Corp. v. Commissioner of Taxes, supra, at ——, 100 S. Ct. at 1232. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." Moorman Mfg. Co. v. Bair, 437 U. S., at 273. See also Underwood Typewriter Co. v. Chamberlain, 254 U. S., at 120. In order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the sale of petroleum products in that State." Mobil Oil Corp. v. Commissioner of Taxes, supra, at ——, 100 S. Ct. at 1232. The court looks to the "underlying economic realities of a unitary business," and the income must derive from "unrelated business activity" which constitutes a "discrete business enterprise," *Id.,* at ——, 100 S. Ct. at 1233. We agree with the Wisconsin Supreme Court that Exxon is such a unitary business and that Exxon has not carried its burden of showing that its functional departments are "discrete business enterprises" whose income is beyond the apportionment statute of the State. While Exxon may treat its operational departments as independent profit centers, it is nonetheless true that this case involves a highly integrated business which benefits from an umbrella of centralized management and controlled interaction.

Accordingly, this Court sustained Wisconsin's inclusion of all Exxon's functional departments as part of its unitary business subject to apportionment. These functional departments included exploration and production, refining, marketing, marine, coal and shale oil, minerals and land management. Only Exxon's marketing division conducted business in Wisconsin.

The important aspect of the *Exxon* holding to this case is that this Court applied the same unitary principle used in *Mobil* to Exxon's own business activities. The relevant unitary business connections were found to exist internally within Exxon Corporation's own activities.

The same internal unitary business exists with ASARCO. The issue is *not*—as ASARCO would have it—whether or not unitary connections exist between the payor corporations and the payee corporation but whether or not the intangible assets (represented by shares of stock or evidences of debt) are held and managed by ASARCO as part of its own overall unitary business a part of which is conducted in Idaho. As the *Exxon* holding clearly demonstrates, it is the taxpayer's own unitary business which provides the "underlying activity" or the "functionally integrated enterprise" necessary to apportion the income.

There is no constitutionally significant difference between this case and the *Exxon* case. In *Exxon* the taxpayer engaged in activities outside the taxing state which were different from those conducted in the state. As noted above, these included production, refining, marine, coal and shale oil, minerals and land management. However, the activities conducted outside the state were sufficiently related to the activities conducted within the state to justify the conclusion that all of the activities were

part of the taxpayer's unitary business, and that the income from all of these activities should be apportioned. Here, one of ASARCO's activities, conducted outside Idaho, is the acquisition, management and sale of certain intangible assets resulting in income in the form of dividends, interest and capital gains. The Idaho Court has similarly concluded that these activities are sufficiently related to ASARCO's other business activities, a part of which are conducted in Idaho, to make them part of ASARCO's unitary business and to justify apportionment of that income. The record supports that conclusion.

To subject dividends, interest or capital gains earned from securities issued by foreign corporations does not, of course, amount to taxation of the foreign corporations. A shareholder is a taxable entity entirely separate from the corporation issuing the shares. *Moline Properties, Inc. v. Commissioner,* 319 U. S. 436 (1973). The dividends are ASARCO's own income. That is why the relevant "underlying activity" is ASARCO's own activity—its own business purpose for acquiring, managing or selling these intangible assets. ASARCO's fallacy is its refusal to recognize the fundamental principle that taxation of dividends or of interest or of capital gains is *not* taxation of the payor corporation. The Idaho Supreme Court recognized ASARCO's argument "rests upon a misconception of what the state sought to tax" [App. p. 27a] and therefore, correctly rejected ASARCO's assertion that this Court's decision in Mobil required modification of its original ruling.*

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* ASARCO's assertion that the Idaho Supreme Court "failed" to comply with this Court's direction on remand that it re-

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ASARCO suggests [J.S. p. 12] that this Court should review this case to remedy inconsistencies between the Idaho Court's ruling and the decisions of other state courts. However, the Idaho Court is in harmony with the recent decisions of this Court and decisions of other state courts. See, e. g., *Adams Express*, 165 U. S. 194 (1986), *rehearing*, 166 U. S. 185 (1897); *Bass, Ratcliff & Gretten v. State Tax Comm'n*, 266 U. S. 271 (1942); *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Underwood Typewriter Co. v. Chamberlain*, 245 U. S. 113 (1920); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U. S. 123 (1931); *Moorman Mfg. Co. v. Bair*, supra; *Exxon Corp v. Wisconsin Dept. of Revenue*, — U. S. —, 100 S. Ct. 2109 (1980); *Ford Motor Co. v. Beauchamp*, 308 U. S. 331 (1939); *International Harvester v. Department of Taxation*, 322 U. S. 435 (1944); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940); *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N. W. 2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N. W. 2d 612 (1965); *app. dism'd*, 384 U. S. 718 (1966); *F. W. Woolworth Co. v. Director of Division of Taxation*, 45 N. J. 466, 213 A. 2d 1 (1965); *Gulf Oil Corp v. Morrison*, 120 Vt. 324, 141 A. 2d 671

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consider its decision "in light of" *Mobil* hardly merits response. [J.S. p. 9] The fact that the Idaho Court reinstated its original opinion without change, does not justify the conclusion that the Idaho Court did not carefully and analytically consider this Court's opinion in *Mobil*. The fact is that voluminous briefs were submitted to the Idaho Court both by parties and by amici curiae and full oral argument was held on remand. After due consideration and analysis of *Mobil*, the Idaho Court simply concluded that its original opinion was correct.

(1958); *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A. 2d 839 (1972); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P. 2d 729 (1974); *Appeal of W. J. Voit Rubber Co.*, May, 1974 C. C. H. Cal. Tax Rep. para 202-435; *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A. 2d 310 (1975); *Albany International Corp. v. Halperin*, 388 A. 2d 901 (Me. 1978); *Champion International Corp. v. Bureau of Revenue*, 88 N. M. 411, 54 P. 2d 1330 (1975); *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal. 2d 214, 238 P. 2d 569 (1951), *app. dismissed for want of a substantial federal question*, 334 U. S. 939 (1952); *Qualls v. Montgomery Ward*, 266 Ark. 207, 585 S. W. 2d 18 (1979); *Montana Department of Revenue v. American Smelting and Refining Co.*, — Mont. —, 567 P. 2d 901 (1977), *app. dismissed*, 434 U. S. 104 (1978); *W. R. Grace & Co. v. Commissioner of Revenue*, — Mass. —, 393 N. E. 2d 330 (1979).

II.

The apportionment permitted by the Idaho Court does not contravene the Commerce Clause.

In Part III of its Jurisdictional Statement, ASARCO argues that Idaho is attempting to subject it to multiple taxation because the dividends in question were actually subjected to foreign withholding taxes.

There are several difficulties with this argument. The first and most obvious is that the record is utterly devoid of any fact or evidence establishing that such taxation actually took place. As the Idaho Court recognized:

> However, ASARCO has not established that it was in fact subject to multiple taxation and that the

> possibility of such multiple taxation has been rejected as a grounds for invalidating an apportionment statute. [App. p. 32a]

Regardless of whether it is the actuality or the substantial risk of taxation which is the proper test, it is clear that the taxpayer must prove that the risk or actuality exists. See *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450 (1959); *General Motors Corp. v. Washington,* 377 U. S. 436, 439 (1974); *Standard Pressed Steel Co. v. Dept. of Revenue of Washington,* 419 U. S. 560, 563 (1975); *Moorman Mfg. Co. v. Bair,* 437 U. S. 267 (1968).

In any event, the argument is clearly without substantive merit. ASARCO, like Mobil, bases its argument on the holding in *Japan Line Ltd. v. County of Los Angeles,* 441 U. S. 434 (1979). ASARCO's position that it was subjected to the actuality of multiple taxation, whereas Mobil asserted only the risk of double taxation, does not distinguish this case from *Mobil.* What this Court had to say in *Mobil* more than adequately responds to ASARCO's argument:

> This argument is unpersuasive in the present context for several reasons. First, it attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue. By admitting the power of the State of commercial domicile to tax foreign source dividends *in full,* Mobil necessarily forgoes any contention that local duplication of foreign taxes is proscribed. Thus, the only inquiry of constitutional dimension is the familiar question whether taxation by apportionment at home produces significantly greater tax burdens than taxation by allocation. Once appellant's argument is placed in this perspective, the presence or absence of taxation abroad diminishes in importance.

Second, nothing about the logic of Mobil's position is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source.

Third, appellant's argument underestimates the power of this Court to correct excessive taxation on the field where appellant has chosen to pitch its battle. A discriminatory effect on foreign commerce as a result of multiple state taxation is just as detectable and corrigible as a similar effect on commerce among the States. Accordingly, we see no reason why the standard for identifying impermissible discrimination should differ in the two instances.

Finally, acceptance of appellant's argument would provide no guarantee that allocation will result in a lesser domestic tax burden on dividend income from foreign sources. By appellant's own admission, allocation would give the State of commercial domicile the power to tax that income in full, without regard to the extent of taxation abroad. Unless we indulge in the speculation that a State will volunteer to become a tax haven for multinational enterprises, there is no reason to suspect that a State of commercial domicile will be any less vigorous in taxing the whole of the dividend income than a State like Vermont will be in taxing a proportionate share.

Moreover, ASARCO's argument that inclusion of the alleged "foreign source" dividends in Idaho's apportionment base results in multiple taxation, also ignores the fundamental distinction between state income taxes and income taxes imposed at a national level. As this Court observed in *Mobil*, supra:

Concurrent federal and state taxation of income, of course, is a well established norm. Absence some ex-

> plicit directive from Congress, we cannot infer the treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but not enacted, legislation designed to regulate state taxation of income . . . Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so.

ASARCO attempts to avoid the *Mobil* ruling by suggesting, for the first time, that all income of this kind is immune from state taxation. [J.S. p. 16] There is not the slightest authority for the proposition that such income from intangibles is immune from all state income taxation—even by the state of the taxpayer's commercial domicile. The authority, in fact, is to the contrary. *Hawley v. Madden,* 232 U.S. 1 (1914); *Klein v. Bd. of Tax Supervisors,* 282 U.S. 19 (1930); *First Bank Stock Corp. v. Minnesota,* 301 U.S. 234 (1937); *Wheeling Steel Corp. v. Fox,* 298 U.S. 193 (1936). Even if double taxation is found to actually exist, this Court recognized in *Mobil* that "concurrent federal and state taxation of income, of course, is a well established norm." There is no reason to prohibit such concurrent taxation by state and foreign governments, when it exists as an "established norm" in regard to state and federal taxes.

The question is not whether the income is immune from state taxation, but rather which state or states may constitutionally subject it to taxation. The alleged risk of multiple taxation is not affected by a resolution of this issue. It is difficult to see how subjecting all of the income taxation at the taxpayer's state of commercial domicile creates a lesser risk of multiple taxation (on an interna-

tional level) than does apportioning the same income among several states in which the taxpayer conducts business. To the extent that there is any multiple taxation at all, a resolution of the issue presented here does not change that result. The Idaho Supreme Court's treatment of this issue—although couched in terms of the due process clause—is entirely consistent with this Court's treatment in *Mobil* quoted earlier. The Idaho Court said:

> If the due process clause were to prohibit the inclusion of dividends in a taxpayer's taxable income unless the payor corporation also conducts business within the taxing state, the due process clause would logically also prohibit the taxpayer's domicile from taxing those dividends if the payor corporation did not conduct its business within the domiciliary state, and indeed it would prohibit the United States and any state from ever taxing dividends paid the taxpayer by a corporation whose activities are located entirely without this country. The due process clause simply does not limit the right to tax dividends paid a taxpayer to the jurisdictions in which the payor corporation conducts its business. We believe that any constitutional limitations upon a state's right to apportion the intangible income, including dividends, of a multistate corporation doing business within the state are satisfied by the Idaho statutory requirement that the acquisition, management or disposition of the underlying asset must be an integral or necessary part of the taxpayer's unitary business, a part of which is conducted in this state. [Citations omitted] [App. p. 28a]

III.

The Due Process Clause does not require any part of a dividend payor corporation's property, payroll and sales to be reflected in the payee corporation's apportionment factors.

Even though ASARCO has not established by clear and cogent evidence that the formula applied by Idaho to ASARCO taxes extraterritorial income or values, ASARCO nevertheless argues, on authority of *Mobil*, that if dividends are apportionable, the formula must be adjusted by including the property, payroll and sale of the dividend payor corporation on a prorata basis to the apportionment factors. As the Idaho Court recognized, this conclusion is based upon the invalid assumption that the inclusion of dividends in apportionable income is the taxation of the payor corporation's profits, and that if dividends are included in apportionable income, a taxpayer is entitled to ASARCO's proposed apportionment relief as a matter of constitutional law without having to meet the burden of showing by clear and cogent evidence that the unadjusted formula reaches a disproportionate result. The Idaho Court responded to ASARCO's argument as follows:

> In the context of the second due process limitation—that the income attributed to Idaho for tax purposes must be rationally related to values connected with this state—ASARCO attacks the commission's computation of its tax liability on two grounds. ASARCO first argues that if the dividends it received are included as apportionable business income, then the due process clause requires that the property, payroll and sales factors of the dividend paying corporations be included in the denominator of the apportionment formula; otherwise ASARCO claims the income apportioned to Idaho would be disproportionate to the income producing activities within the state. This argument is premised on the same misconception about the entity and income the state is attempting to tax that we discussed above and has been soundly rejected for the same reasons. F. W. Woolworth Co. v. Commissioner of Taxes, 328 A. 2d 402 (Vt.

1974); see also F. W. Woolworth Co. v. Director of Division of Taxation, 213 A. 2d 1 (N.J. 1965). [App. p. 29a]

The fallacy of ASARCO's suggestion can be demonstrated with a simple illustration. Assume that Corporation A does business in two states—Idaho and Oregon. It conducts no business activities, owns no property, sells no products nor employs any person beyond the boundaries of those two states. Assume further, however, that Corporation A owns 49 percent of the stock of Corporation B. Corporation B confines all of its business activities to the State of Wyoming. Assume still further that the activities of Corporations A and B are so functionally interrelated as to be inseverable and that the unitary ties established by intercompany flow of goods and services, management and control and other activities clearly establish the sort of functional integration which even ASARCO must concede would, under the *Mobil* decision, permit Idaho to treat the dividends paid by Corporation B to Corporation A as apportionable business income of Corporation A.

ASARCO's contention would lead to the result that 49 percent of Corporation B's Wyoming property, payroll and sales would be added to the denominators of Corporation A's property, payroll and sales both in Idaho and in Oregon in each year B pays dividends to A. The Idaho numerators and the Oregon numerators would remain unchanged. These factors would then be averaged to determine the Idaho and Oregon apportionment factors. If the resulting Idaho and Oregon apportionment factors are added together, they will not equal 100 percent. (Because the numerators of the Idaho and Oregon factors,

when added together, will not equal the denominators.) But in our illustration, Corporation A conducts business activity in no state other than Idaho and Oregon. Accordingly, it must follow that all of its taxable income must be earned in those two states. What has happened to the remainder of the income? The addition of Wyoming property, payroll and sales values to Corporation A's denominators has caused some of the income to be attributed to Wyoming—a state in which Corporation A has no tax situs and conducts no business activities. It seems imminently obvious that Corporation A, because it conducts no business activities whatsoever in Wyoming, cannot be said to have earned taxable income in Wyoming. ASARCO's formula does exactly what ASARCO itself admits is unconstitutional; it attributes income to a place where it is not—and cannot be—earned.

The answer to this apparent dilemma is very simple. The dividend income earned by a shareholder corporation is its own income. ASARCO's suggestion ignores the fact that Idaho seeks to tax—and may only tax—ASARCO's income. The Idaho Court has recognized that fact in its first decision when it stated:

> The commission did not levy a tax upon the income of the dividend-paying corporations; rather, it levied a tax upon ASARCO's income. These dividends are clearly part of ASARCO's income and it is unquestioned that there is sufficient connection between ASARCO and this state to constitutionally permit the state to tax its proper share of ASARCO's income. [App. p. 28a]

Because dividend income is the payee corporation's income, it is entirely inappropriate to add the payor corporation's property, payroll or sales to the payee's factors. They are simply different taxpayers.

Another difficulty with ASARCO's suggestion is that there is neither a legal, nor a logical, nor a practical relationship between the payor corporation's property, payroll and sales activities and its payment of dividends. Even if we presume that somehow the payor's property, payroll and sales factors are attributable in part to the payee, the decision by the payor corporation to pay dividends or to defer paying dividends may or may not be related to the amount of its property, payroll and sales or even to whether the payor corporation has had a profit or a loss year. It makes absolutely no sense to force upon the payee corporation a share of the payor corporation's property, payroll and sales for apportionment formula purposes in the year in which the payor corporation elects to pay a dividend.

A final difficulty is that the payee corporation may not even have access to, or any ability to obtain, information about the payor corporation's property, payroll and sales so that it could make any adjustments to its own factors. Mobil Oil Company's 10 percent ownership in ARAMCO illustrates the problem. If the Saudia Arabian government (which controls ARAMCO) chooses not to tell Mobile what ARAMCO's property, payroll and sales figures may be, there is no way that an adjustment like that suggested by ASARCO could be made.

In short, ASARCO's argument that the *Mobil* decision somehow requires adjustments to be made to the apportionment formula factors is utterly without merit.

Finally, the Idaho statute provides to ASARCO the precise remedy which ASARCO here seeks but it has refused to avail itself of that remedy. The Idaho statute specifically allows "combined reporting" of the income of

parent and subsidiary corporations when the activities of the corporation are so closely integrated that they constitute a single business enterprise. *Idaho Code* § 63-3027(s) as in effect during the years in question here, provided:

> For purposes of this section a parent and subsidiary corporation may, when necessary to accurately reflect income, be considered a single corporation. [App. p. 73a]

The trial court in this matter, in fact, did require that six wholly owned subsidiaries should be combined and treated as a single taxpayer. [See Findings of Fact 18-24 and Conclusion of Law 2—App. pp. 41a-42a, and 44a] ASARCO did not appeal the trial court's determination that six of the subsidiaries should be combined. Treatment of the combined group of corporations as a single taxpayer means that all of the income and all of the property, payroll and sales of the combined group is used in the apportionment process. The existence of this option under the Idaho statute, remedies any constitutional defect that might otherwise exist. ASARCO cannot be heard to complain that it has been unfairly taxed when it has failed to avail itself of—and at the trial court level, vigorously opposed the use of—statutory provisions which would have permitted it to recognize in its apportionment scheme the property, payroll and sales of the subsidiary corporations.

IV.

The decision of the Idaho Supreme Court is not a final judgment.

The jurisdiction of this Court to review the decision of the Idaho Supreme Court is, of course, based upon

28 U. S. C., § 1257 which limits the appellate jurisdiction of this Court to review of "final judgments." The Idaho Supreme Court's decision [App. pp. 33a-35a] remanded the case to the trial court for a determination of certain factual issues relating to the proper determination of the sales factor portion of the apportionment formula. The issue remanded by the Idaho Court to the trial court is not severable from the issues upon which the Appellant seeks review but is necessarily related. A determination of the proper application of the sales factor under the UDITPA three-factor formula is necessary before it can be finally known what absolute amount or portion of ASARCO's total income Idaho will deem to have been earned from Idaho sources. This Court has held that a state taxing scheme must be judged based upon the result which it reaches. For example, in *Hans Rees' Sons v. N. Carolina*, 283 U. S. 123 at 135 (1931), the court held a North Carolina tax unconstitutional because:

> . . . [T]he statutory method, as applied to appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income all out of appropriate proportion to the business transaction transacted by the appellant in that State.

Other decisions also support the proposition that a state tax must be measured based upon its known result. In *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 444 (1940), the Court stated:

> That test is . . . whether the taxing power exerted by the state bears fiscal relationship to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

See also *Hump Hairpin Co. v. Emmerson,* 258 U. S. 290, 296 (1922) and *International Harvester v. Evatt,* 329 U. S. 416 (1947).

So long as the state courts have yet to determine how the sales factor portion of the three-factor UDITPA formula is to be applied to this taxpayer, the full extent of this taxpayer's income which the state is subjecting to income taxes is not known.

It is important that the entire apportionment formula as used in UDITPA and enacted in Idaho be clearly understood. It is found in *Idaho Code* § 63-3027. [App. p. 67a] The steps for determining the amount of an interstate taxpayer's income which is attributable to Idaho are as follows: First, the total net taxable income from all activity and sources both within and without the State of Idaho is determined. Second, the amount of nonbusiness (nonunitary) income is computed and subtracted from the amount determined in step one. This result is the net business (unitary) income subject to apportionment. Third, an apportionment factor is computed. This apportionment factor is the average of three factors—sales in the taxing stated divided by sales everywhere plus real and tangible personal property in the taxing state divided by such property everywhere plus payroll in the taxing state divided by payroll everywhere. Fourth, the apportionment factor as computed in the third step is applied to the net apportionable business income computed in the second step to determine the amount of apportionable income to be attributed to the taxing state. Fifth, any nonbusiness income found to be allocable in its entirety to the taxing state is added to the result determined in the fourth step. This sum represents the income sub-

ject to the tax in the taxing state and to which that taxing state's tax rate may be applied.

The record does not reflect the precise amount of ASARCO's taxable income attributed to Idaho which a resolution of the sales factor issue might affect. The record does reflect that virtually all of the sales attributed to Idaho are included in the disputed amount. It is reasonable to conclude, therefore, that approximately one-third of ASARCO's total income tax liability to the State of Idaho may remain in question.

Therefore, it can be clearly seen that the issues decided by the Idaho Supreme Court and the issue remanded by it to the trial court for further decision are inextricably tied together since all of the issues relate to the determination of variables in the same apportionment formula. The constitutional test by which that formula is measured is whether or not it attributes an amount of income which is in "appropriate proportion to the business transacted by the appellant" in the State of Idaho. [*Hans Rees' Sons*, supra]

CONCLUSION

For the reasons stated herein, this appeal should either be dismissed or affirmed.

DATED this —— day of June, 1981.

Respectfully submitted,

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